



NO. S-127611
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA
BETWEEN

DANIEL CHRISTOPHER SCOTT, MARK DOUGLAS CAMPBELL,
GAVIN MICHAEL DAVID FLETCHER, KEVIN ALBERT MATTHEW
BERRY, BRADLEY DARREN QUAST, AARON MICHAEL
BEDARD

PLAINTIFFS

AND

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

**CASE MANAGEMENT HEARING
WRITTEN SUBMISSIONS OF THE PLAINTIFFS**

Background and Introduction to litigation

The Problem for Veterans

1. In 2005, the New Veterans Charter (*NVC*) was voted in with the approval of all parties in Parliament to be effective April 1st, 2006. The purported and expected aim of the *NVC* was to front end load benefits for disabled soldiers to facilitate a better transition for them into civilian life. The *NVC* focused on a capped one-time lump sum payments in lieu of monthly pension payments.
2. Prior to April 2006, disabled Canadian Forces members were compensated under the *Pension Act*, which was similar to a provincial workers' compensation program, but with full benefits for the life of the veteran and the member's spouse entitled to pension benefits after the death of the disabled member.
3. With newly injured Canadian Forces members from the ten-year Afghan War coming into the veterans system, numerous studies documented very low settlements and considerable hardship for veterans under the *NVC*, especially for severely disabled soldiers.
4. In 2011, Bill C-55, called the *Enhanced NVC*, made improvements to the *NVC* in the area of monthly Earnings Loss payment for severely disabled members.
5. The Plaintiffs say that not all of the issues were solved by the *Enhanced NVC* because:
 - (a) the *NVC* still doesn't provide adequate disability benefits;

- (b) NVC programs that are supposedly available in theory (e.g. training) have restrictions which prevent actual access by veterans to the programs;
- (c) Severely disabled Canadian Forces members (78% - 100% Disability) who receive a lump sum payout and long-term monthly Earnings Loss benefits under the *NVC* can be financially disadvantaged by approximately 30% compared with the previous *Pension Act* benefits;
- (d) Moderately disabled Canadian Forces members (average 40% Disability) who receive a lump sum payout and short-term Earnings Loss benefits for two years (while being retrained) under the *NVC* can be financially disadvantaged by up to 65% compared with the previous *Pension Act* benefits;
- (e) Partially disabled (5%-25% Disability), especially Reserve, Canadian Forces members who are not medically released from the Forces and who receive only a lump sum payout can be financially disadvantaged by up to 90% of what other workers' compensation programs, and/or the courts, would award for a similar disability.

The SISIP Class Action Case

- 6. A veteran, Dennis Manuge, filed a class-action lawsuit in March 2007 on behalf of himself and other disabled veterans whose long-term disability benefits under the *Pension Act* (not the *NVC*) were reduced by the amount of the monthly Veterans Affairs disability pensions they received.
- 7. That case related to retroactive *Pension Act* payments to veterans that dated back to 1976.
- 8. The Federal Court ruled, in essence, that it was not lawful for the federal government to treat pain and suffering awards as income and therefore claw them back from the Veterans Affairs disability pensions.
- 9. Only recently the government announced that it would not appeal the Federal Court decision and appointed a negotiator to negotiate a settlement with the disabled veterans.
- 10. The *Manuge* action dealt with separate and different issues than the issues raised in this action but the Plaintiffs say that the case is illustrative of the delays that can occur in the conduct of an action.

This Action

- 11. The Plaintiffs filed the Notice of Civil Claim for this proceeding on October 30, 2012. A copy of the Notice of Civil Claim was served on the Defendant on the same day.
- 12. Immediately after being served, counsel for the Defendant contacted counsel for the Plaintiffs and requested time for the Defendant to consider the Defendant's position. This request was granted by Plaintiffs' counsel.
- 13. The Plaintiffs filed an Amended Notice of Civil Claim on November 28, 2012. A copy of the Amended Notice of Civil Claim was served on the Defendant on November 29, 2012.

14. On March 11, 2013, counsel for the Plaintiffs, with the consent of the Defendant, wrote to the Court to request the appointment of a Case Management Judge.
15. Subsequently, the Defendant took the position that it was neither required nor willing to file a Response to Civil Claim prior to the action being certified as a class proceeding.
16. The Plaintiffs submit that whether the action is certified as a class proceeding or not, the Plaintiffs will proceed with the action as permitted by sections 9 or 10 of the *Class Proceedings Act*.
17. The Plaintiffs propose that the action be certified as a class proceeding for reasons of judicial economy (as an alternative to numerous actions by individual veterans) and access to justice (because those numerous individual veterans – unlike the government cannot afford to litigate the individual cases).
18. It is submitted that the class proceeding aspects of this case are not the most important factors or the factors which should predominate in the governance of the conduct of this litigation. The dominant factors in the litigation are the constitutional claims.
19. The constitutionality of legislation is always a justiciable question. In *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, Laskin, J. at p. 151:

The question of the constitutionality of legislation has in this country always been a justiciable question.

The Defendant must comply with the *Supreme Court Civil Rules*

20. The object of the *Supreme Court Civil Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits in ways that are proportionate to the amount involved, the importance of the issues in dispute and the complexity of the proceeding.
21. The Rules, which are intended to reduce the complexity, costs and delay involved with litigation, empower the Court to impose terms and conditions and give directions it considers will further these objectives when making orders.

Case Planning Conference Participants - "Party of Record to an Action"

22. The Rules restrict participation in case planning conferences to a "party of record to an action" (see Rule 5-1, Rule 5-2, Rule 5-3, and Rule 5-4).

To be a Party of Record a Response to Civil Claim must be filed

23. With the adoption of the present Rules of Court in 2010, Appearances (both Conditional and Unconditional) were abolished and the only way for a Defendant to appear before the Court and become a party of record to an action is to file a Response to Civil Claim.

Rules of Court - Response to Civil Claim

24. Under Rule 3-3(3) of the *Supreme Court Civil Rules*, a Response to Civil Claim must be filed and served within 21 days after the defendant is served with the Notice of Civil Claim.

25. This Rule requires every defendant in an action to substantively plead their case at the outset in order to expedite the proceedings before the Court.
26. The Plaintiffs submit that the immediate filing of the Defendant's Response to Civil Claim is especially critical in this case, where the foundation for constitutional arguments advanced by the Plaintiffs arises from the historical commitments of the Crown which should be either admitted or denied in order to appropriately determine the future course of the litigation.
27. The Plaintiffs submit that the Defendant's position that it is not required to file a Response to Civil Claim prior to the action being certified as a class proceeding is contrary to the present Rules of Court and even if permitted would be unreasonable, particularly since the Defendant has had ample opportunity to consider its position and expressly sought an extension of time from counsel for that purpose.
28. Section 2 of the *Class Proceedings Act*, RSBC 1996, c. 50, further contemplates that a Response to Civil Claim should be filed prior to a certification application. Section 2 reads, in part:

Plaintiff's class proceeding

2 (1) One member of a class of persons who are resident in British Columbia may commence a proceeding in the court on behalf of the members of that class.

(2) The person who commences a proceeding under subsection (1) must make an application to a judge of the court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing the person as representative plaintiff.

(3) An application under subsection (2) must be made

(a) within 90 days after the later of

(i) the date on which the last response to civil claim was served, and

(ii) the date on which the period prescribed by the Supreme Court Civil Rules for service of the last response to a notice of civil claim expires without that pleading having been served, or

(b) at any other time, with leave of the court.

29. Given the complexity of the case and the importance of the issues to the Plaintiffs and others, the Defendant must be required to plead its case prior to a certification application.
30. While the Response to Civil Claim is long overdue, the Plaintiffs submit that the Court should order that the Defendant's Response to Civil Claim be filed and delivered within 14 days, in default of which the Plaintiff be granted leave to enter default judgment against the Defendant under Rule 3-8, upon filing proof with the Court that the Plaintiffs on the 15th day of April, 2013 have given the Defendant Notice of Intention to Obtain Default Judgment as required by section 25 the *Crown Liability and Proceedings Act*.
31. If the Defendant by its default in filing a Response to Civil Claim, permits default judgment to be entered against the Defendant, the Court must still conduct an assessment of damages limited to those damages that flow from the claim as pleaded based upon the premise that the default judgment amounts to an admission that all of the allegations in the Claim are true.

32. The Court would also determine the constitutional and declaratory relief claimed by the Plaintiffs on the same basis.

Plaintiffs Proposed Judicial Management Conference Order

33. Delivered herewith is the Plaintiffs' proposed Judicial Management Conference Order.
34. The Plaintiffs submit that, pursuant to the *Practice Direction of the Court on Electronic Evidence*, that since the conditions referred to in paragraph 2.3 of the *Practice Direction* exist in this case, the Court order that there be an Electronic Trial of the proceeding, which trial should include all of the aspects referred to in paragraph 2.10 of the *Practice Direction* and further order that the Case Management Judge shall decide any of the matters set out in paragraph 2.9 of the *Practice Direction* at Judicial Management Conferences.
35. The fundamental premise of the Plaintiffs' proposal is to provide for parallel paths for the various aspects of the case preparation rather than a sequential approach which, in these types of cases, and given the resources of the parties, is neither necessary nor desirable. In other words, the Plaintiffs submit that they should be entitled to discovery in the ordinary course and prior to a certification hearing.
36. Section 2(2) of the *Class Proceedings Act* requires the Plaintiff make an application to a judge of the court for an order certifying the proceeding as a class proceeding within the time limits set out in paragraph 28 (above) but the *Class Proceedings Act* also provides in section 17(1) that "Parties to a class proceeding have the same rights of discovery under the Supreme Court Civil Rules against one another as they would have in any other proceeding."
37. Depending on the Response to Civil Claim and the admissions that may, or may not, be made by the Defendant, both document (which is, in the normal course, required under Rule 7-1 within 35 days of the close of the pleading period) and oral discovery will be essential to the just and fair determination of the action.
38. Discovery of the individual files of the Representative Plaintiffs will play the same essential role as in any personal injury action with the added focus on whether or not the Defendant acted in accordance with what the Plaintiffs assert are the constitutionally required imperatives they are due as veterans who were injured in the service of their country.
39. Discovery of government documents relating to the implementation and analysis of the *New Veterans Charter* will also be required for the fair determination of the Plaintiffs' claims. The Plaintiffs say that discovery of these documents will establish the breaches alleged to have been committed by the Defendant as alleged in the Notice of Civil Claim and the entitlement of the Plaintiffs and class members to the relief claimed.
40. The Plaintiffs expect to receive all material documents within the Defendants possession or control, but specifically the Plaintiffs will require disclosure by the Defendant of all documents associated with Veteran Affairs Canada's Modernization Task Force established in 2003; all documents associated with the Veteran Affairs Canada - Canadian Forces Advisory Council (VAC-CFAC) established in 2000; all documentation related to the Defendant's pension "reform" studies in 1995; and all studies of the efficacy of the NVC since its implementation.

41. With respect to the discovery of Veteran Affairs Canada documents, the Plaintiffs submit that the adjudication of the Plaintiff's claims will require complete disclosure of file materials and e-mail and other communications between Veteran Affairs Canada senior bureaucrats including Larry Murray, Jack Stagg, Brian Ferguson, Darragh Mogan, Bob Atkinson and Ken Miller, to specifically name a few.
42. Depending upon the Response to Civil Claim, the Court will be called upon to decide what evidence the Plaintiff will be required to lead for the determination of the historical truths pleaded in support of the Plaintiffs claims for constitutional remedies. This may require orders for access to and disclosure of materials in the Archives and historical records of Canada.
43. The Plan must also anticipate the organization of the various categories of expert evidence which may, again depending upon the admissions of the Defendant, be left in issue. In this case the areas of expertise required to be put before the Court may include historical evidence, medical evidence, evidence with respect to patterns of discrimination and evidence of rehabilitation practices for veterans with physical and mental injuries.
44. As a result of the foregoing, it is important that pleadings be finalized and for disclosure to proceed in a timely way.
45. For these reasons the Plaintiffs respectfully request this Honourable Court to make the orders set out in the draft Judicial Management Conference Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 7, 2013



Donald J. Soroohan, QC
Counsel for the Plaintiffs

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

**DANIEL CHRISTOPHER SCOTT, MARK DOUGLAS
CAMPBELL, GAVIN MICHAEL DAVID FLETT, KEVIN
ALBERT MATHEW BERRY, BRADLEY DARREN QUAST,
AARON MICHAEL BEDARD**

PLAINTIFFS

AND

THE ATTORNEY GENERAL OF CANADA

DEFENDANT

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

JUDICIAL MANAGEMENT CONFERENCE ORDER

))
)	THE HONORABLE)
BEFORE)	MR. JUSTICE WEATHERILL)
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WEDNESDAY,
MAY 8, 2013

AT A JUDICIAL MANAGEMENT CONFERENCE conducted on 8 May, 2013, by Mr. Justice Weatherill in the presence of Donald J. Soroohan, Q.C., counsel for the Plaintiffs, and Paul Vickery, counsel for The Attorney General of Canada;

THIS COURT ORDERS that:

Pleadings

1. The Defendant shall file a Response to Civil Claim in this Action within 14 days of the date of this Order.
2. The Plaintiffs may file a Reply in accordance with Rule 3-6 of the Supreme Court Civil Rules.

3. If the Defendant fails to file a Response to Civil Claim as required by this Order, the Plaintiffs have leave to proceed against the Defendant for default under Rule 3-8, upon filing proof with the Court that the Plaintiffs, on the 15th day of April, 2013, have given the Defendant Notice of Intention to Obtain Default Judgment, as required by section 20 of the *Crown Liability and Proceedings Act*.

Discovery

4. Each party of record must, within 90 days after the Defendant files and serves on the Plaintiffs a Response to Civil Claim in this Action, prepare a List of Documents in accordance with Rule 7-1 of the *Supreme Court Civil Rules*.
5. The parties are permitted to make demand for additional documents in accordance with Rule 7-1 (11) of the *Supreme Court Civil Rules*, prior to obtaining an order certifying this proceeding as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.
6. The Plaintiff and the Defendants will conduct any examinations for discovery within 120 days from the delivery of the Lists of Documents.
7. There will be an Electronic Trial of the proceeding, which trial should include all the aspects referred to in paragraph 2.10 of the *Practice Direction of the Court on Electronic Evidence*.
8. The Case Management Judge shall decide any of the matters set out in paragraph 2.9 of the *Practice Direction* at Judicial Management Conferences.

Certification

9. The Plaintiffs shall make an application for an order certifying this proceeding as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50, within 90 days from the date on which the Response to Civil Claim is Served.
10. The Defendant shall have 28 business days following service of the Notice of Application to file and serve their response material.

11. The hearing of the certification application shall not be set down until after such time as discovery is complete.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER.

Signature of Lawyer for the Plaintiff
Donald J. Sorochan, Q.C.

Signature of Lawyer for the Defendant
Paul Vickery

By the Court

Registrar